

B. W. H. asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Eblen's summary dismissal of Mr. H.'s complaint that Southern Utah University engaged in employment discrimination against Mr. H. because of his age, in violation of the Utah Antidiscrimination Act, Title 34A, Chapter 5, Utah Code Ann.

The Appeals Board exercises jurisdiction in this matter pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-5-107(11).

BACKGROUND AND ISSUES PRESENTED

The Utah Antidiscrimination Act (Title 34A, Chapter 5, Utah Code Ann.) prohibits employment discrimination on the basis of age.¹ Dr. H., who is now 67 years old, contends Southern Utah University ("SUU") did not select him as a mathematics professor because of his age. SUU responds that it selected other, more qualified applicants for the faculty position and that Mr. H.'s age was not a factor in SUU's hiring decisions.

As required by the Utah Antidiscrimination Act, Dr. H. filed his initial complaint with the Utah Antidiscrimination and Labor Division. The Division investigated, but found no reasonable cause to believe SUU's hiring decision was based on age. Dr. H. then requested a formal *de novo* evidentiary hearing on his complaint. The case was assigned to Judge Eblen. After the parties completed the discovery process, Dr. H. and SUU each filed a motion for summary judgment. Judge Eblen concluded that the undisputed facts established that SUU's hiring decision was unrelated to age and, as a matter of law, did not constitute unlawful employment discrimination. Judge Eblen therefore granted SUU's motion for summary judgment.

Dr. H. now requests Appeals Board review of Judge Eblen's decision. Dr. H.'s motion for review identifies various issues that Dr. H. believes are in dispute. Dr. H. also alleges that SUU has used improper methods to obtain information and that such information has been improperly considered as evidence in this proceeding.

APPLICABLE LEGAL STANDARDS

Section 34A-5-105(1) of the Utah Antidiscrimination Act prohibits employers from refusing to hire any person otherwise qualified for the position in question because the person is 40 years of age or older. In order to prevail in an age discrimination case, the complainant must first make a *prima facie* claim by establishing that he or she: 1) was at least 40 years of age; 2) applied for an available position and was qualified for that position; and 3) was rejected under circumstances that give rise to an inference of unlawful discrimination. The employer must then come forward with legitimate, nondiscriminatory reasons for its hiring decision. If the employer does so, the complainant must provide evidence that the employer's purported reason for selecting another person is not the true reason and that the hiring decision was, in fact, based on age.

While the Act prohibits invidious employment discrimination, the Act does not seek to

interfere with bona fide nondiscriminatory selection and management decisions. The Utah Supreme Court observed in University of Utah v. Industrial Commission, 736 P.2d 630, 635 (Utah 1987):

The Act was not intended to override or diminish traditional management decisions, nor does it require an employer to hire an applicant. An employer has the discretion to choose among candidates so long as the decision is not based on unlawful criteria. Although the employee, and even the judge, may believe that the employer *misjudged* the qualifications of the applicants, that does not, without more, subject the employer to liability under the Act.

Furthermore, a formal evidentiary hearing is not required in every employment discrimination adjudicative proceeding. Section 63-46b-1(4)(b) of the Utah Administrative Procedures Act permits summary judgment, without a formal evidentiary hearing, if the requirements of Rule 56 of the Utah Rules of Civil Procedure are satisfied. Rule 56 allows summary judgment, but only if the record shows “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Because it is SUU’s motion for summary judgment that is under consideration, SUU must demonstrate that it is entitled to judgment as a matter of law, even when all facts and reasonable inferences are viewed in the light most favorable to Dr. H., the nonmoving party. Estate Landscape & Snow Removal Specialists v. Mountain States Telephone & Telegraph Co., 844 P.2d 322, 324 n. 1 (Utah 1992). In Hill v. Grand Central, Inc., 477 P.2d 150 (Utah 1970), the Utah Supreme Court observed:

Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. If there be any such disputed issues of fact, they cannot be resolved by summary judgment even when the parties properly bring the motion before the court.

Finally, as Justice Ginsburg observed in her concurring opinion in Reeves v. Sanderson Plumbing Products, 350 U.S. 133, 154, 120 S.Ct. 2097 (2000):

The Court today holds that an employment discrimination plaintiff *may* survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a “prima facie case” as that term is used in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct 1817, 36 L.Ed.2d 668 (1973); and second, evidence from which a rational factfinder could conclude that the employer’s proffered explanation for its actions was false.

The Appeals Board bears the foregoing principles in mind as it considers the propriety of summary judgment in this case.

FINDINGS OF FACT

The Appeals Board concludes that the following facts are not subject to genuine dispute.

Dr. H. was born on January 5, 1936. He has received a B.A. in physics, then a M.A. and Ph.D. in mathematics. He has 20 years of college-level teaching experience, but none of his experience is more recent than 1991.

During the fall of 2000, SUU was engaged in the process of filling a faculty position in its Mathematics Department, to begin January 2001. The minimum qualifications for the position were: “1) A Ph.D. in Mathematical Science; 2) Commitment to quality undergraduate education; 3) Evidence of teaching excellence; 4) Ability to interact positively with faculty, staff and students; and 5) Active in scholarly activities such as research, curriculum development, etc.”

Ultimately, Dr. H. and thirteen other candidates applied for the position. S.U.U.’s hiring committee chose four candidates, including Dr. H., for interviews and teaching demonstrations. The hiring committee observed Dr. H.’s teaching demonstration. One committee member appraised the demonstration as poor, while the other committee members considered it unimpressive. However, because the three other candidates for the position either withdrew their names from consideration or were unable to begin work in January 2001, Dr. H. was left as the only available finalist for the position.

The hiring committee recommended Dr. H. for the position, but with the caveat that his contract be renewed only if student evaluations of his teaching were generally favorable. The committee made this recommendation because “the principal job of a professor at SUU is teaching” and Dr. H.’s teaching demonstration had been viewed by committee members as poor or unimpressive.

The committee’s recommendation was referred to W. Harold Ormes, Dean of SUU’s College of Science, which College includes the Mathematics Department. Dean Ormes concluded that the committee had recommended Dr. H., despite serious reservations about his teaching ability, only in order to fill the position by January 2001. Dean Ormes further concluded that hiring an excellent teacher was more important than meeting the January 2001 deadline. He therefore decided not to hire Dr. H. at that time, but to reopen the faculty position with a fall 2001 starting date in the hope of attracting a larger pool of applicants.

Dr. H. was one of 21 candidates who applied for the fall 2001 faculty position. The screening committee once again considered Dr. H.’s credentials and teaching demonstration, but recommended Dr. Armstrong for the position based on his superior teaching demonstration.

Later, SUU filed a second vacancy in its Mathematics Department faculty. Dr. H. was once again considered for the position. In this instance, the hiring committee considered Dr. H. to be the strongest candidate with respect to scholarly activities and actuarial study, but appraised Dr. Bahi, age 46, as a better teacher and also better at working with others. Primarily because SUU weighed teaching ability as heavily as all the other factors combined, the committee recommended Dr. Bahi for the position. Dr. Bahi was ultimately hired.

The Appeals Board does not make any findings regarding Dr. H.’s filing of other employment discrimination claims. For purposes of summary judgment, the Appeals Board considers the existence of other filings to be irrelevant to the question of whether SUU engaged in

unlawful employment discrimination against Dr. H..

DISCUSSION AND CONCLUSION OF LAW

To withstand SUU's motion for summary judgment, Dr. H. is not required to "prove" his case. Rather, he need only demonstrate that, when facts and reasonable inferences are viewed in his favor, some material facts remain in genuine dispute. Or, to borrow the summary of Justice Ginsburg's concurring decision in Reeves v. Sanderson Plumbing Products, Dr. H.'s complaint will survive if he submits: 1) evidence establishing a prima facie case of age discrimination, and 2) evidence that rationally can be viewed as discrediting the employer's proffered non-discriminatory explanation for its actions.

SUU concedes that Dr. H. has submitted evidence of a prima facie case of age discrimination. However, SUU has come forward with a plausible non-discriminatory reason for its decision not to hire Dr. H.. The question now before the Appeals Board is whether Dr. H. has identified any evidence that can rationally be viewed as discrediting SUU's explanation.

A great deal of Dr. H.'s argument in this matter represents his own subjective opinion that he was the most qualified candidate for employment in SUU's mathematics department. However, the Utah Supreme Court's observation in University of Utah v. Industrial Commission, 736 P.2d at 635, bears repeating:

An employer has the discretion to choose among candidates so long as the decision is not based on unlawful criteria. Although the employee, and even the judge, may believe that the employer *misjudged* the qualifications of the applicants, that does not, without more, subject the employer to liability under the Act.

Thus, the question before the Appeals Board is not whether Dr. H. has a reasonable belief that he was the most qualified candidate for employment, or whether the Appeals Board believes Dr. H. to be the most qualified candidate. Rather, the Appeals Board must focus on SUU's reasons for the hiring decisions it made. If the undisputed evidence establishes that those decisions were unrelated to Dr. H.'s age, then SUU is entitled to dismissal of Dr. H.'s discrimination complaint as a matter of law.

The Appeals Board has carefully considered Dr. H.'s evidence and argument, but finds no genuine dispute as to the determinative facts. In particular, SUU filled the faculty positions in question based on SUU's appraisal of the strengths and weaknesses of the various candidates. SUU's primary institutional focus is on undergraduate education. For that reason, SUU considers teaching ability to be the most important consideration in selecting new faculty.

Regarding the faculty position ultimately filled by Dr. Armstrong, Dean Ormes exercised his authority to reopen the hiring process, even though the screening committee had recommended Dr. H., because of bona fide concern about Dr. H.'s teaching ability. Ultimately, Dr. Armstrong was selected because SUU believed he had the best teaching ability. Likewise, with respect to the faculty position filled by Dr. Bahi, it was once again SUU's appraisal of Dr. Bahi's teaching ability that resulted in Dr. Bahi's selection over Dr. H.. The Appeals Board finds no evidence that SUU's

decisions were influenced by Dr. H.'s age, or the age of the other candidates.

In summary, the Appeals Board concludes that Dr. H.'s complaint of age discrimination is unsupported by the evidence in this matter. The Appeals Board finds no genuine dispute to the fact that SUU's hiring decisions were based on the judgment that Dr. Armstrong and Dr. Bahi were best qualified to discharge SUU's teaching objectives. The Appeals Board finds no evidence that SUU's hiring decisions were related to Dr. H.'s age or the age of the other applicants.

ORDER

The Appeals Board affirms Judge Eblen's decision and denies Dr. H.'s motion for review. It is so ordered.

Dated this 31st day of October, 2003.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

1. The Act also prohibits employment discrimination based on race, color, sex, pregnancy, religion, national origin and disability.